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No.

IN THE
Supreme Court of the United States

October Term, 2000

SERGEANT MAJOR DAVID MAY,
United States Marine Corps,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

F. J. BUSTAMANTE
Lieutenant Commander
JAGC, U.S. Navy

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Lieutenant, JAGC
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QUESTION PRESENTED

Whether the substantive use of Petitioner's prearrest silence violates the Fifth Amendment, federal case law, and Mil. R. Evid. 304(h)(3)?

TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 2

Constitutional Provision and Military Rule of Evidence Involved 2

Statement of the Case 2

I. Facts 2

II. Proceedings Below 4

Reasons for Granting the Petition 5

1. This Court has held that a defendant can be impeached with his prearrest silence, but not whether the defendant's silence may be used as substantive evidence in determining guilt 5

2. Even if this Court affords no Fifth Amendment protection to Petitioner, the CAAF's affirmance wholly ignores the protections under Mil. R. Evid. 304 7

Conclusion 9

Appendix A 1a

Appendix B 2a

Appendix C 3a

TABLE OF AUTHORITIES

Cases

United States Supreme Court

Brecht v. Abrahamson,
507 U.S. 619 (1993).. 5
Jenkins v. Anderson,
447 U.S. 231 (1980)..... 5-6
Miranda v. Arizona,
384 U.S. 436 (1966)..... 5

Federal Courts

Combs v. Coyle,
205 F.3d 269 (6th Cir. 2000) 6
Coppola v. Powell,
878 F.2d 1562 (1st Cir. 1989)..... 6
United States v. Musquiz,
45 F.3d 927 (5th Cir. 1995) 7
United States v. Oplinger,
150 F.3d 1061 (9th Cir. 1998)..... 7
United States ex rel. Savory v. Lane,
832 F.2d 1011 (7th Cir. 1987)..... 6
United States v. Zanabria,
74 F.3d 590 (5th Cir. 1996) 7

Miscellany

Mil. R. Evid. 304(h)(3) ..... *passim*

In The
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SERGEANT MAJOR DAVID MAY,
United States Marine Corps,
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UNITED STATES OF AMERICA,
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On Petition for Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

Sergeant Major David May, United States Marine Corps, petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The order of the United States Court of Appeals for the Armed Forces, *United States v. May*, granting review and affirming the decision of the lower court is located in Appendix A at 1a. The court's order denying Petitioner's motion to reconsider is located in Appendix B at 2a. The unpublished opinion of the Navy-Marine Corps Court of Criminal Appeals is located in Appendix C at 3a-26a.

JURISDICTION

The lower court entered its judgment on September 5, 2000. Petitioner filed a timely petition for reconsideration, which was denied on December 8, 2000. App. B at 2a. This Court's jurisdiction is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISION AND MILITARY RULE OF EVIDENCE INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

> . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, ...

Military Rule of Evidence 304(h)(3) provides:

> A person's failure to deny an accusation of wrongdoing concerning an offense for which at the time of the alleged failure the person was under official investigation or was in confinement, arrest, or custody does not support an inference of an admission of the truth of the accusation.

STATEMENT OF THE CASE

I. Facts

Petitioner's stepdaughter, TH, alleged that Petitioner sexually abused her for several years from the time she was 15 years of age. After Petitioner and TH's mother separated in 1984, he had monthly visitation rights with their three children, including TH, his stepson (PH), and his natural daughter (CM). Record at 218, 569. TH was 11 years of age at the time her mother and Petitioner

separated. Record at 217. From September 1988 to October 1990, Petitioner's children would visit him every month for a weekend and Petitioner made the sleeping arrangements. Record at 552, 569. TH claimed that Petitioner raped her, forcibly anally sodomized her, and forced her to perform fellatio on him over a two-year period from September 1988 to October 1990. Record at 224, 230, and 232.

The service of a civilian temporary restraining order in February 1993 notified Petitioner that he was under investigation for these offenses. Record at 565. Petitioner consulted with military defense counsel and a civilian defense counsel to address the temporary restraining order. In March 1993, Petitioner had a conversation with his natural daughter, CM, and she asked him if he sexually abused TH. Record at 363-64. Petitioner did not respond in any manner. *Id.*

At trial, the prosecution called CM in its case in chief. The prosecutor asked, in direct examination, about CM's March 1993 conversation with Petitioner. CM testified that she asked Petitioner if the allegations of sexual abuse against TH were true. CM responded that "[Petitioner] really didn't say anything." Record at 364. The defense did not object to the prosecutor's question or CM's response. *Id.* The prosecutor proceeded to repeat the question and CM's answer. *Id.* In an Article 39(a), UCMJ session (side bar conference) immediately following, the judge admonished the prosecutor, outside the presence of the military jury, stating that the answer should not have been elicited. Record at 366. It was a comment on Petitioner's right to remain silent. *Id.* The judge failed to give a curative instruction to the military members panel when the court reassembled. Record at 369. Lastly, despite the judge's admonishment, the prosecutor used Petitioner's silence as a point of emphasis when she urged the members panel, in closing argument, to recall what CM had stated in her direct testimony. "Recall the conversation [CM] had with her

father and what I asked her when I was talking to her. Recall that she stated she talked to her father about the molestation and he didn't say anything." Record at 617. The judge again failed to give a curative instruction in response to this violation to advise the members panel that such evidence was improper.

II. Proceedings Below

The United States Navy charged Petitioner with rape, carnal knowledge, and forcible sodomy in violation of Articles 120 and 125, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920 and 925. The jury found Petitioner guilty of one specification of carnal knowledge and sentenced him to reduction in rate from E-9, the highest enlisted rank, to E-1 and to be separated from the Marine Corps with a bad-conduct discharge.

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed the decision in an unpublished opinion on January 14, 2000. It held "that no error materially prejudicial to the appellant's substantial rights was committed. Arts. 59(a) and 66(c), UCMJ." *United States v. May*, No. 9402027 (N-M. Ct. Crim. App. January 14, 2000) (unpublished decision). Petitioner filed a petition for grant of review to the United States Court of Appeals for the Armed Forces (CAAF) on March 21, 2000. Petitioner requested a grant of review from the CAAF and, as part of this request, asked the CAAF to determine the validity of the prosecution's use of Petitioner's pretrial silence in its case in chief. The CAAF's order granted the petition in its entirety, but summarily affirmed the decision of the NMCCA on September 5, 2000. Petitioner filed a petition for reconsideration on October 30, 2000, and the CAAF denied this petition on December 8, 2000.

REASONS FOR GRANTING THE PETITION

The lower court's order eviscerated Petitioner's right against self-incrimination, in contravention of the Fifth Amendment and Mil. R. Evid. 304(h)(3). Rather than enforcing these rights, the court allowed the prosecution to use Petitioner's silence as substantive evidence of his guilt. This action is contrary to this Court's case law, a majority of the federal circuit's case law, and the plain language of Mil. R. Evid. 304(h)(3). This Court should grant review to address the substantial constitutional issues raised by this petition.

1. It is well established that the privilege against self-incrimination is a right guaranteed by the Constitution. *Miranda v. Arizona*, 384 U.S. 436 (1966). "The privilege [against self-incrimination] has come rightfully to be recognized in part as an individual's substantive right . . . ." *Id.* at 460. This right, however, is not without limits. This Court held that the Fifth Amendment is not violated when a defendant, who testifies in his own defense, is *impeached* with his prearrest silence. *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980). *See also Brecht v. Abrahamson*, 507 U.S. 619 (1993). In *Jenkins*, this Court noted that impeachment followed the defendant's decision to "cast aside the cloak of silence" and aided the truth-finding function of a criminal trial. *Jenkins*, 447 U.S. at 238. In that regard, "Attempted impeachment on cross-examination of a defendant . . . may enhance the reliability of the criminal process." *Id.*

No such enhancement can be gained here. Petitioner's circumstance is divergent from that in *Jenkins* since Petitioner's prearrest silence was not used for impeachment, but as substantive evidence in the prosecution's case in chief. In Petitioner's circumstance, the prosecutor elicited the fact of his pretrial silence from CM during her case-in-chief and was promptly reproached by the judge for her violation. Record at 364, 366. The judge failed to give a curative instruction to the members

panel before the prosecutor was permitted to resume her direct examination of CM. Record at 369. Most importantly, the prosecutor, despite the judge's admonishment, blatantly argued the fact of Petitioner's silence in her closing argument. Record at 617. The Supreme Court concluded that the Fifth Amendment is not violated by the use of prearrest silence to *impeach* a defendant's credibility, however, it did not address whether a prosecutor could ever use a defendant's pretrial silence as substantive evidence in its *case-in-chief*. *Jenkins*, 447 U.S. at 238.

The federal circuit courts of appeal are in conflict over whether the government may comment on a defendant's prearrest silence in its case in chief. *Combs v. Coyle*, 205 F.3d 269, 282 (6th Cir. 2000). *See also United States ex rel. Savory v. Lane*, 832 F.2d 1011 (7th Cir. 1987); *Coppola v. Powell*, 878 F.2d 1562 (1st Cir.), *cert. denied*, 493 U.S. 969 (1989). "*Jenkins* did not, however, address the question at issue in this case, namely, whether the use of prearrest silence as substantive evidence of guilt violates the Fifth Amendment." *Combs*, 205 F.3d at 281. In *Combs*, an off-duty policeman shot the defendant and, as the defendant sat on the ground holding a shotgun, another police officer arrived and asked him what had happened. 205 F.3d at 278. The same policeman asked the defendant once again as the defendant was placed into an ambulance to which the defendant told the officer to "talk to his lawyer." *Id.* The prosecutor elicited this information during the testimony of the police officer who posed the question to the defendant. 205 F.3d at 279. The judge gave a jury instruction directing the jury to avoid drawing inferences "for or against the defendant because he may have requested an attorney." *Id.* The prosecutor then argued that the defendant's statement regarding his lawyer did not reflect the thought process of a man too intoxicated to possess the intent to commit the murders with which the defendant was charged. *Id.*

The Sixth Circuit, in *Combs*, analyzed the defendant's

statement as a comment on his right to silence, despite the fact that the defendant's statement referred to "his right to an attorney." 205 F.3d at 279 (*citing Wainright v. Greenfield*, 474 U.S. 284, 295 n.13 (1986), where the Court held that "post-*Miranda* warnings silence" refers not only to a stated desire to remain silent, but also to remain silent until the defendant has consulted an attorney.). The Sixth Circuit's view was that, in either a pre- or post-arrest setting, "it is clear that a potential defendant's comments could provide damaging evidence that might be used in a criminal prosecution; the privilege should thus apply." *Id.* at 283.

A minority of the circuits has determined that the government, in its case in chief, can use the defendant's prearrest silence. *See United States v. Musquiz*, 45 F.3d 927, 931 (5th Cir. 1995) (defendant's post-arrest, pre-*Miranda* silence deemed probative, hence no error); *United States v. Oplinger*, 150 F.3d 1061, 1066 (9th Cir. 1998) (no Fifth Amendment protection when defendant is under no official "compulsion" to speak); *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996) (no Fifth Amendment protection for defendant's prearrest silence since government did not induce it). Petitioner's pretrial silence is not probative of his guilt. He was advised by his military and civilian counsel not to discuss the allegations with anyone. His decision to remain silent, as was his right under the Fifth Amendment, was used against him nevertheless by the prosecutor as substantive evidence. Silence in the face of an accusation does not support the inference that the accusation is, in fact, true. Mil. R. Evid. 304(h)(3).

2. Even assuming, *arguendo*, that the Fifth Amendment affords Petitioner no protection, the CAAF wholly ignored Mil. R. Evid. 304(h)(3). This rule prevents an adverse inference against a defendant where a defendant fails "to deny an accusation of wrongdoing concerning an offense for which at the time of the alleged failure the person was under official investigation." Mil. R. Evid. 304(h)(3). The

use of the Petitioner's silence advanced far beyond an adverse inference. Petitioner's Fifth Amendment privilege against self-incrimination was violated when the prosecutor highlighted Petitioner's silence not once, but twice in succession, during the direct testimony of CM. Record at 364. The prosecutor argued Petitioner's silence as substantive evidence against him in a closely contested case. It was generally agreed by all parties in the case that the case was one of credibility between Petitioner and his stepdaughter, TH. The prosecutor argued this fact to the members panel when she stated, "The government submits that the real issue in this case is not what happened, but whether it happened." Record at 617. The outcome centered on Petitioner's credibility versus his stepdaughter's since the Government did not produce any eyewitness testimony, medical testimony, or other direct evidence.

It requires little imagination to determine the prosecutor's intent. She argued directly to the members, "Recall the conversation [CM] had with her father and what I asked her when I was talking to her. Recall that she stated she talked to her father about the molestation and he didn't say anything." Record at 617. Highlighting Petitioner's silence on three separate occasions, all in the presence of the members panel, demonstrates her intention: in the absence of admissible evidence sufficient to convict Petitioner, the prosecutor elicited that Petitioner failed to deny the charges when presented the opportunity, and therefore committed the sexual abuse against TH.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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March 2001

Appendix A

U.S. COURT OF APPEALS FOR THE ARMED FORCES

No. 96-0841

Crim.App. No. 94 2027

David May, Sergeant Major,
U.S. Marine Corps, *Appellant*

v.

United States, *Appellee*

ORDER GRANTING REVIEW

On consideration of the petition for grant of review of the decision of the United States Navy-Marine Corps Court of Criminal Appeals, it is, by the Court, this 5th day of September, 2000,

ORDERED:

That said petition is hereby granted; and
That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,
Thomas F. Granahan
Clerk of the Court

APPENDIX B

U.S. COURT OF APPEALS FOR THE ARMED FORCES

No. 96-0841

Crim.App. No. 94 2027

David May, Sergeant Major,
U.S. Marine Corps, *Appellant*

v.

United States, *Appellee*

ORDER

On consideration of appellant's petition for reconsideration of this Court's order issued on September 5, 2000, it is, by the Court, this 8th day of December, 2000,

ORDERED:

That said petition for reconsideration is hereby denied.

For the Court,

Thomas F. Granahan
Clerk of the Court

APPENDIX C

IN THE U.S. NAVY-MARINE CORPS COURT
OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON D.C.

W.A. DeCICCO JOHN W. ROLPH R.H. TROIDL

UNITED STATES

v.

David MAY, 452 74 4163
Sergeant Major (E-9), U.S. Marine Corps,

NMCM 94 02027 Decided 14 January 2000

Sentence adjudged 31 May 1994. Military Judge: E.D. Clark. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 3d Marine Aircraft Wing, Marine Forces Pacific, MCAS El Toro, Santa Ana, CA.

LT Frank M. Doherty, JAGC, USNR, Appellate Defense Counsel
LT Estela I. Velez, JAGC, USNR, Appellate Defense Counsel
Maj R.K. Stutzel, USMC, Appellate Defense Counsel
George Kripner, Civilian Defense Counsel
LT William C. Minick, JAGC, USNR, Appellate Government Counsel
LCDR Nancy B. Jones, JAGC, USN, Appellate Government Counsel
Col Charles Wm. Dorman, USMC, Appellate Government Counsel
CDR D.H. Myers, JAGC, USN, Appellate Government Counsel

ROLPH, Judge:

At his general court-martial composed of officer and enlisted members, conducted on various dates in March and May of 1994, the appellant was found guilty, contrary to his pleas, of one specification alleging carnal knowledge of his step-daughter, TH, on various occasions between September 1988 and July 1989, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (1994).[1] He was sentenced to reduction in rate to E-1 and a bad-conduct discharge. In November 1994, the convening authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered it executed.

This case already has a significant appellate history. On 5 March 1996, this court affirmed the appellant's findings and sentence in a very brief opinion. *See United States v. May*, No. 94-2027 (N.M.Ct.Crim.App. 5 Mar 1996)(unpublished op.). That decision was subsequently set aside by our superior court, and the appellant's record of trial was returned to us for plenary review with assistance of appellate counsel under Article 70, UCMJ. *See United States v. May*, 47 M.J. 478 (1998).[2] Newly assigned appellate counsel have completed their review under Article 70, UCMJ, and have submitted their appellate briefs to us for consideration.

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[1] The appellant was found not guilty of raping and forcibly sodomizing TH on various occasions during the period Sep 1988 to Oct 1990 in violation of Articles 120 and 125, UCMJ.

[2] The Court of Appeals for the Armed Forces held that the appellant had been denied effective assistance of competent counsel and plenary review when both his civilian and military appellate defense counsel failed to file any assignments of error with this court, including issues that had been specified by the appellant himself pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Additionally, this court's failure to enforce its own order (issued after ten separate motions for "Enlargement of Time to File" had been granted) directing military appellate defense counsel to be prepared to file assignments of error independent of the civilian defense counsel's assistance or guidance served as a basis for our prior decision being set aside.

We have carefully reviewed the record of trial, the appellant's seven assignments of error, and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the appellant's substantial rights was committed. Arts. 59(a) and 66(c), UCMJ.

Facts

TH testified that the appellant had been her stepfather from the time she was two-years-old, and that she referred to him as "Dad." Record at 217. After TH's mother and the appellant separated in 1984, TH saw the appellant "usually every other weekend" and slept in the same bed with him "every night just about" when she visited. Record at 218, 219. During September 1988, when TH was 15-years-old, the appellant was living in a two-bedroom apartment in Port Hueneme, California. Record at 220. From 11 September 1988 to October 1990, TH, her brother, and her younger sister visited the appellant "just about every weekend" from Friday evening to Sunday evening. Record at 221. The sleeping arrangements were dictated by the appellant. Record at 222. TH's sister slept in the second bedroom, TH's brother slept on the couch, and TH and the appellant slept together in the master bedroom. Record at 220. The door to the master bedroom would usually be closed and locked each night by the appellant. Record at 223. TH testified that the appellant would then "have sex with me." Record at 223, 224, 225. When asked what she meant by this, TH specified that "[h]e'd put his penis in my vagina." Record at 224. TH estimated that, between September 1988 and October 1990, the appellant had sex (including intercourse and sodomy) with her approximately 50 times. Record at 233. TH testified that she was never married to the appellant. Record at 217. She also testified that she was sure that the sex acts with appellant occurred between 11 September 1988 and 26 July 1989, when she was 15-years-old. Record at 217 and 227.

TH's brother and sister corroborated the unusual sleeping arrangements at the appellant's apartment. Record at 332-33; 353-54. The Government also presented the testimony of Dr. Sue Beck, a licensed clinical psychologist, who was recognized as an expert in "incestual sexual abuse and molestation within the family dynamic." Record at 399-438. Dr. Beck evaluated and treated TH during five one-hour sessions over a three-month period. Record at 405. She testified that it was her expert opinion that TH "has the constellation of symptoms that are commonly found in survivors of incest or molest[ation]," and that she was "very confident" in her opinion. Record at 411 and 434. Although the appellant denied that he ever had sex with the victim, he admitted under oath that he slept in the same bed with her and would "generally always lock the door" to his bedroom when she was there. Record at 552. Additionally, the members were allowed to listen to a conversation between the appellant and his daughter that was tape-recorded by an agent of the Naval Criminal Investigative Service (NCIS). *See* Prosecution Exhibits 1A and 3. In that conversation, the appellant makes a number of statements that the members could easily find consistent with TH's claims.

Legal and Factual Sufficiency of the Evidence

In his first assignment of error, the appellant asserts that the evidence presented at his general court-martial was legally and factually insufficient to support his conviction for carnal knowledge. Appellant's Brief of 12 May 1999 at 2-4. We strongly disagree.

The test for assessing legal sufficiency is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[3]

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[3] The elements of carnal knowledge in violation of Article 120, UCMJ, are as follows:

1) That the accused committed an act of sexual intercourse with a certain

Jackson v. Virginia, 443 U.S. 307, 319 (1979); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). When applying this test, we are bound to draw every reasonable inference from the record in favor of the prosecution. *United States v. McGinty*, 38 M.J. 131 (C.M.A. 1993).

The test for assessing factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses . . . [we are ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325; *see* Art. 66(c), UCMJ. The term "reasonable doubt" does not mean, or require, that the evidence must be devoid of any and all conflict. *United States v. Lipps*, 22 M.J. 679, 684 (A.F.C.M.R. 1986).

Under our Article 66(c), UCMJ, mandate, we may only affirm court-martial findings that are correct in law and fact, and that we determine, on the basis of the entire record, should be approved. In executing this mandate, we are given broad power to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." Art. 66(c), UCMJ.

Discussion

The essence of the appellant's argument in this assignment of error is that, since neither the appellant nor the Government asserted a "consent" theory in this case, the evidence is insufficient to sustain his conviction for carnal knowledge. Specifically, the appellant asserts that the Government presented a case grounded in the sole proposition that any and all sexual acts that occurred between TH and appellant

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female;

2) That the female was not the accused's spouse; and

3) That at the time of the sexual intercourse the female was under 16 years of age.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, (1984 ed.), Part IV, ¶ 45.b.(2).

occurred by force and without her consent. The appellant plainly asserted that none of the acts ever occurred. Without citing any legal authority for his proposition, the appellant argues that this "compromise verdict" yielding a conviction for carnal knowledge -- "an offense premised upon consent" -- is unsupportable, legally and factually, by the evidence. We disagree. Our thorough review of the record of trial demonstrates to us that there was more than sufficient evidence from which the members could have concluded that the appellant was guilty beyond a reasonable doubt of carnal knowledge. Indeed, we found the evidence of the appellant's guilt on this offense overwhelming.

Consent is neither an element of, nor a defense to, carnal knowledge. *See* MCM, Part IV, ¶ 45.b.2; Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at 439 (30 Sep 1996). Instead, carnal knowledge is simply "sexual intercourse [with a minor who is not one's spouse] under circumstances not amounting to rape." MCM, Part IV, ¶ 45.c.(2). The Government pled the rape and carnal knowledge offenses alternatively.[4] The following facts may explain the members' ultimate findings in this case: 1) TH did not report these offenses until over 3 years after the sexual abuse ceased, and, the matter was not brought up directly with law enforcement personnel, but instead was first raised in a counseling session; 2) when asked at trial how she felt about the appellant, TH testified, "I love him, he's nice." Record at 229; 3) TH admitted knowing that the appellant would likely seek to have sex with her when she visited his apartment on weekends, but she went anyway. *Id.* 4) There was no evidence that TH screamed or cried out for help, and virtually no evidence that she physically resisted, or that the appellant applied force much beyond the mere act of penetration. Record at 225, 229. 5)

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[4] Carnal knowledge is a listed lesser-included offense of rape. MCM, Part IV ¶ 45.d.(1)(e). Also, the Government did not request, nor was there given, an instruction on "consensual sodomy" as a lesser-included offense of forcible sodomy. *See* Record at 678.

The evidence clearly established that TH was receiving special treatment and significant favoritism from the appellant during the period this sexual abuse was taking place. Additionally, the fact that the military judge did not instruct the members on "constructive force" or "parental coercion" may explain why they found the force element of rape lacking.

Contrary to the appellant's assertion, the members' findings do not demonstrate that they considered the sex acts "consensual." More logically, they concluded that the evidence clearly established that the sex had occurred, but fell short of establishing the appellant's use of force beyond a reasonable doubt. We note that the military judge properly instructed the members on the elements of each offense alleged, and also gave a proper instruction advising the members that carnal knowledge had been pled alternatively for exigencies of proof. Record at 645-46; *and see* Appellate Exhibit XLVI (findings worksheet). There was no objection to these instructions, or to the alternative pleading in general. From our review of the record, there is more than sufficient evidence to establish each element of carnal knowledge beyond a reasonable doubt. We are also convinced that the members' findings do not represent a "compromise verdict." Finally, we are ourselves convinced beyond a reasonable doubt of the appellant's guilt on this offense. This assignment of error is without merit.

Motion for Mistrial

The appellant's second assignment of error asserts that the military judge abused his discretion when he denied the appellant's motion for a mistrial during the trial counsel's argument on findings in this case. Appellant's Brief of 12 May 1999 at 4. We disagree.

The appellant chose not to present any character witnesses (for truthfulness or good military character) on the merits of this case after the military judge ruled that such witnesses could be asked "did you know" or "have you heard" questions regarding alleged sexual abuse committed by the appellant over

many years prior to the period of abuse charged.[5] Record at 102. Those earlier alleged offenses were barred from prosecution by the statute of limitations. Record at 28; *see* discussion of Assignments of Error IV and V, *infra*.

In her argument on findings, the trial counsel made the following statements:

> [The] Government's not here to vouch for [TH]'s credibility. She doesn't have the chevrons. She doesn't have the uniform. She doesn't have the years of military service that the accused has. She's the outsider, but she came into this courtroom and testified in front of all of you, the accused's peers. And even though we're not here to vouch for her credibility, many of the witnesses did. ***How many vouched for the accused's truthfulness?***

Record at 639 (emphasis added). The military judge immediately called an Article 39(a), UCMJ, session *sua sponte*, and strongly admonished the trial counsel for improperly commenting upon the appellant's "presumption of innocence."[6] *Id.* The defense team objected to the argument, and stated "This may be egregious to the point of mistrial with prejudice." *Id.* However, contrary to the assertions contained in the appellant's brief, the appellant never made a motion for a mistrial on the record. Instead, the matter was discussed at length on the record, and apparently considered in depth over a one-hour recess. Record at 641. When the court reconvened, the military judge made it clear that, while error had occurred, he was "not considering this deliberate error or

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[5] The military judge also agreed to give a proper limiting instruction in the event such questions were asked by the Government on cross-examination. Record at 104.

[6] These comments were actually objectionable in that they commented upon the appellant's right to remain silent and present no evidence at all, and appeared to shift the burden of proof from the Government to the appellant.

deliberate misconduct." Record at 642. He entered the following finding on the record:

> I have considered the issue which is before the court and even though this court is quite concerned about the egregation (sic) of errors which border on justifying mistrial, this is another instance where I believe that this error can be corrected with a limiting instruction to the members, which I propose to give them, again reemphasizing to the members that the burden of proof is on the Government, is always on the Government, [and] never shifts to the defense. Any argument to the contrary is disregarded.

Record at 642. Thereafter, the following instruction was given to the members ***without defense objection***:

> Members, before I give you the general instructions that you must follow on the findings and the procedures (sic), I must instruct you on a matter that arose during argument. One of the last statements made before you in argument was to ask you the rhetorical question, "how many vouched for the accused?" That question in my mind raised the issue of whether the Government was shifting to the accused the burden of proof in this case, and as I've indicated to you before, the burden of proof is on the Government. It begins with the Government. It stays with the Government. It never shifts to the accused. Any inference or any implication that the accused has a burden to present evidence of any type is incorrect. You must remember at all times that the burden of proof is on the Government. The accused is presumed by law to be innocent. He is, in fact, innocent until the Government overcomes that presumption of innocence by establishing beyond reasonable doubt his guilt.

Record at 643. Finally, it must be noted that the trial counsel was allowed no further argument on findings, and that the

military judge immediately proceeded into his instructions on the law to be applied in the appellant's case.[7] Record at 643.

After findings were returned by the members, the appellant raised a "Motion for Reconsideration" of the military judge's earlier ruling "denying" the appellant's "Motion for Mistrial."[8] Record at 674; Appellate Exhibit LVIII. The military judge denied this later motion. Record at 677-78.

Discussion

"The military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." RULE FOR COURTS-MARTIAL 915(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1984 ed.). "The power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons." *Id.*, Discussion. It is a well-respected principle of law that recognizes the declaration of a mistrial as a drastic method of remedying error at trial, and one reserved solely for "those situations where the military judge must intervene to prevent a miscarriage of justice." *United States v. Garces*, 32 M.J. 345, 349 (C.M.A. 1991); *United States v. Turner*, 42 M.J. 783, 786 (N.M.Ct.Crim.App. 1995). Such a remedy will normally be granted only to prevent manifest injustice. *Id*; *United States v. Brooks*, 42 M.J. 484, 487 (1995). Absent a clear abuse of

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[7] The instructions on findings reemphasized again many of the same points made by the military judge in his tailored instruction above.

[8] Again, it is noted that, in our opinion, no pre-findings "Motion for Mistrial" was ever made by the defense, and there is no ruling by the military judge on the record "denying" such a motion. The civilian defense counsel's statement that, "This may be egregious to the point of mistrial with prejudice," was not, in our opinion, the equivalent of a specific request or motion for a mistrial. Indeed, that same counsel agreed to the military judge's proposed curative instructions without dissent or objection. Record at 642. However, for purposes of this appeal, we will address the matter as if it had been properly raised and preserved at trial.

discretion, a military judge's ruling denying a motion for mistrial will not be reversed. *United States v. Dancy*, 38 M.J. 1, 6 (C.M.A. 1993); *United States v. Rushatz*, 31 M.J. 450, 456 (C.M.A. 1990); *United States v. Rosser*, 6 M.J. 267, 270-71; *United States v. Jeanbaptiste*, 5 M.J. 374, 376 (C.M.A. 1978).

"When a military judge is satisfied that the Government has not engaged in intentional misconduct during the trial and concludes that an instruction will cure the potential error, such a procedure is 'preferred.'" *Garces*, 32 M.J. at 349 (quoting *United States v. Evans*, 27 M.J. 34, 39 (C.M.A. 1988)); *accord United States v. Pastor*, 8 M.J. 280, 284 (C.M.A. 1980). That was the case here, and we concur with the military judge's considered determination that there was no "deliberate error or deliberate misconduct" involved. Record at 642. That determination was followed by a thorough and clear instruction that was given immediately after the objectionable comment. Record at 643. Simply stated, the trial counsel made a seven-word slip of the tongue that the military judge recognized and remedied immediately. Viewed in the context of the entire argument, this statement by the trial counsel did not have great potential to prejudice the appellant. It was an isolated and brief reference that was not affirmatively exploited by the trial counsel to buttress her case against the appellant on any of the charged offenses.

All members acknowledged the military judge's curative instructions and indicated that they could and would follow them. *Id.* Similar instructions were repeated in his pattern instructions to the members. Record at 647. "Even where the possibility of harm to the accused has been acute, both the Supreme Court and [the Court of Appeals for the Armed Forces] have indulged in a 'crucial assumption' that such instructions will be followed in the absence of evidence to the contrary." *Garces*, 32 M.J. at 349 (quoting *Tennessee v. Street*, 471 U.S. 409, 415 (1985)); *United States v. Garrett*, 24 M.J. 413 (C.M.A. 1987). Nothing in the record of this general court-martial compels us to question that assumption in this case.

Accordingly, we conclude that the military judge did not abuse his discretion in denying the appellant's motion for a mistrial. Also, we are convinced that the error that occurred during the Government's argument on findings, 1) was not deliberate, 2) was cured by the military judge's instructions, and 3) was harmless beyond a reasonable doubt. This assignment of error is without merit.

Sentence Appropriateness

The appellant next alleges that a sentence that includes an unsuspended bad-conduct discharge is inappropriately severe for a "consensual act" where the appellant had achieved the highest enlisted paygrade. Appellant's Brief of 12 May 1999 at 8. We strongly disagree.

A court-martial is free to impose any legal sentence that it determines is appropriate. *United States v. Turner*, 14 C.M.A. 435, 437, 34 C.M.R. 215, 217 (1964); R.C.M. 1002. An appropriate sentence results from an "individualized consideration" based upon "the nature and seriousness of the offense and the character of the offender." *United States v. Rojas*, 15 M.J. 902, 919 (N.M.C.M.R. 1983) (citing United States v. Snelling, 14 M.J. 267 (C.M.A. 1982)), *aff'd*, 20 M.J. 330 (C.M.A. 1985); *see also United States v. Varacalle*, 4 M.J. 181, 183 (C.M.A. 1978) (holding that the sentencing authority should consider both the effect of the punishment on the accused as well as the community it protects through proper sentencing).

We do not believe the sentence in this case is in any way inappropriate. The appellant was found guilty of having sexual intercourse on multiple occasions with his 15-year-old stepdaughter. *See United States v. Osborne*, 31 M.J. 842, 846 (N.M.C.M.R. 1990) (noting the "serious nature" of carnal knowledge offenses).[9] TH estimated that the appellant sexually

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[9] Congress apparently recognized this fact in 1994 when it amended Article 120, UCMJ, subparagraph (e), increasing the maximum authorized confinement for this offense from 15 years to 20 years. *See* MCM,

abused her no less than fifty times. Record at 233. This untoward relationship ultimately negatively impacted many separate families, and seriously tarnished many individuals' views of the United States Marine Corps. Most significantly, the appellant violated the position of trust he occupied in his stepdaughter's life, and emotionally scarred her – perhaps for life -- in innumerable and unquantifiable ways. Notwithstanding the appellant's lengthy and admirable service history, we believe a bad-conduct discharge is more than appropriate in this case. In our opinion, the appellant's sentence was extremely lenient considering the serious nature of his offenses, and the fact that he received no confinement and no forfeitures.

We are also disturbed by the appellant's attempt to minimize his misconduct by claiming that he merely "made a mistake and had **consensual** sexual intercourse with a fifteen year old woman." Appellant's Brief of 12 May 1999 at 9 (emphasis in original). Again, we reiterate what we stated earlier concerning the offense of carnal knowledge. Consent is neither an element of, nor a defense to, carnal knowledge. See MCM, Part IV, ¶ 45.b.2; Military Judges' Benchbook, Dept of the Army Pamphlet 27-9 at 439 (30 Sep 1996). Instead, carnal knowledge is "sexual intercourse [with a minor who is not one's spouse] under circumstances not amounting to rape." MCM, Part IV, ¶ 45.c.(2). The facts of this case do not support the appellant's claim that his victim "consented" to the multiple acts of sexual intercourse he engaged her in. Indeed, her testimony painted a completely different picture than what the appellant would have us see. We find it more than disingenuous for the appellant to characterize his minor victim as a "woman" who participated willingly in his sordid sexual depravity.

The appellant's argument is perhaps more appropriately styled as a plea for clemency. This court is tasked with determining sentence appropriateness vice clemency. Clemency, which involves bestowing mercy, is the sole prerogative of the

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Appendix 23 ("Analysis of Punitive Articles"), ¶ 45(e).

convening authority. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); R.C.M. 1107(b). The appellant exercised his opportunity to receive clemency by submitting clemency matters to the convening authority. *See* Major Sean Freeman ltr of 28 October 1994. The convening authority, after reviewing appellant's request (and the extensive enclosures thereto), determined that the appellant's sentence was appropriate. On the basis of the entire record, the appellant received the individualized consideration required by law. *Rojas*, 15 M.J. at 919. The appellant's assignment of error is without merit.

Statute of Limitations Issues

We next address the appellant's forth and fifth assignments of error together. In these two assignments of error the appellant alleges the following:

(1) That the record of trial in this case is substantially incomplete, and inadequate to permit appellate review, because the appropriate date that tolled the statute of limitations cannot be determined without the entire record; and

(2) The military judge erred when he allowed the Government to proceed with charges that included charges barred by the statute of limitations.

See Appellant's Brief of 12 May 1999 at 10-12 and 12-14. We find no merit in either of these assertions, and will address each of the appellant's claims seriatim.

Case History

Because these assignments of error are especially fact-specific, a detailed recitation of the pretrial procedural history of this case is essential to its resolution. By the time this general court-martial was tried, three different charge sheets had been prepared. The first charge sheet was preferred on 14 May 1993 and alleged offenses occurring after an inception date of May 1988. Appellate Exhibit XIX, Exhibit A. After

the first Article 32, UCMJ, hearing (20 July 1993), the appellant's commanding officer dismissed the charges (10 August 1993). Appellate Exhibit XIX at 2. Because these particular charges were never received by an officer exercising summary court-martial jurisdiction over the command, the first charge sheet is irrelevant to a determination of the statute of limitations. *See* Appellate Exhibit XIX, Exhibit A; Art. 43(b)(1), UCMJ.

The second charge sheet was preferred on 7 September 1993, and alleged the same offenses occurring after the same inception date, May 1988. Appellate Exhibit XIX, Exhibit B. These sworn charges were received by an officer exercising summary court-martial jurisdiction on 10 September 1993. *Id.* On 31 January 1994, these charges were dismissed by a military judge as being outside the five-year statute of limitations. Appellate Exhibit XIX, Exhibit D; *see* R.C.M. 907(b)(2)(B).

The third charge sheet, upon which the appellant was ultimately tried and convicted, was preferred on 31 January 1994, and alleged the same offenses as the prior two charge sheets. However, to remedy the statute of limitations problem that plagued the second charge sheet, a new inception date of "September 1988" was alleged. *See* Charge Sheet. Instead of reaching back five years from the receipt of the third charge sheet to January 1989, the specifications on the third charge sheet reached back five years from the receipt of the second charge sheet to September 1988, on the theory that Article 43(g) had tolled the statute of limitations.

The defense motion to dismiss pursuant to R.C.M. 907(b)(2)(B) was litigated at an Article 39(a), UCMJ session conducted on 12 and 16 May 1994.[10] Record at 78-84; 86-97. The military judge granted the motion to dismiss in part with

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[10] *See also* Appellate Exhibit XIX (defense motion to dismiss charges outside statute of limitations); Appellate Exhibit XX (Government response to defense motion to dismiss); Appellate Exhibit XXI (defense reply to Government response).

respect to offenses alleged before 11 September 1988, and denied the motion with respect to offenses alleged after 11 September 1988. Record at 97-98. The 11 September 1988 date is five years prior to the date when the sworn charges on the second charge sheet were received by a summary court-martial officer (10 September 1993). Art. 43(b)(1), UCMJ; Appellate Exhibit XIX at Exhibit B; *see United States v. Babcock*, 10 M.J. 503 (N.C.M.R. 1980) (finding error where specifications, received on 13 September 1979, alleged various drug misconduct occurring at "diverse times from September 1977 to early December 1977" and the military judge failed to limit the court's consideration to the offenses occurring after 13 September 1977, and thus within the two-year statute of limitations).

(1) Incomplete Record of Trial.

A "complete record" of the proceedings and the testimony shall be prepared in each general court-martial case in which the sentence adjudged includes a discharge. Art. 54(c)(1)(A), UCMJ. The matters required to be included in or attached to the record of trial for purposes of creating a "complete record" are specifically enumerated in R.C.M. 1103(b)(2)(D) and (b)(3). When there is a "substantial omission" from the record of trial, a presumption of prejudice results. *See United States v. Boxdale*, 22 C.M.A. 414, 47 C.M.R. 351, 352 (1973). However, "insubstantial omissions" from the record of trial neither affect its status as verbatim nor prevent its characterization as complete and accurate for appellate review. *Id.*; *United States v. McCullah*, 11 M.J. 234 (C.M.A. 1981); *United States v. Griffen*, 17 M.J. 698, 699 (A.C.M.R. 1983).

At the outset, we note that prior charging documents are <u>not</u> one of the specifically enumerated matters required to be included in or attached to the record of trial by R.C.M. 1103(b)(2)(D) and (b)(3). The only real facts of consequence to the determination of the statute of limitations issue in this case are the dates on the previous charge sheets. Contrary to appellant's assertion, the previous charge sheets in this case **<u>are</u>**

attached as allied papers to the record. Appellate Exhibit XIX, Exhibits A and B. From these documents, we can determine the original preferral dates, the date of receipt by the officer exercising summary court-martial jurisdiction, and the dates of the offenses alleged in the specifications of the previous charges. These are more than adequate facts upon which to resolve this statute of limitations issue. Moreover, the relevant procedural history of the case, including relevant dates for a determination of the statute of limitations issue, is entirely clear from the facts as summarized by the military judge in his ruling. Record at 97-98. In resolving a similar statute of limitations issue, the then Court of Military Appeals expressed concern only that the prior charge sheet be before the appellate court:

> In this case . . . the original charge sheet was before the military judge, was preserved as an appellate exhibit, and provided the military judge the means to satisfy himself that the 'sworn charges and specifications' facing the accused had been timely received.

United States v. Miller, 38 M.J. 121, 125 (C.M.A. 1993).

Similarly, in the appellant's case, the prior charge sheet was before the military judge, was preserved as an appellate exhibit, and provided the military judge the means to satisfy himself that the sworn charges and specifications facing the appellant were within the statute of limitations. Appellate Exhibit XIX, Exhibit B; Record at 97. Moreover, because the prior charge sheet is attached to the record, and because the record of trial clearly establishes the procedural history of the case, the absence of the transcript of prior proceedings and the prior Article 32 and Article 34, UCMJ, reports from the record of trial clearly constitute a mere "insubstantial omission." Although these materials were before the military judge when he ruled on the motion to dismiss, a close reading of his findings of fact demonstrate that he relied only on the prior charge sheets to arrive at his ruling. Record at 86 and 97-98. The appellant fails to allege with any specificity why these documents are necessary

to resolve the statute of limitations issue in this case. Clearly, the issue can be conclusively resolved using the prior charge sheets alone. Without citation to legal authority, the appellant simply makes the broad, unsupported, and ambiguous claim that "in order to properly review the statute of limitations issue, the entire record of trial is required." Appellant's Brief of 12 May 1999 at 11. We find the appellant's claim to be without merit.

(2) Charges Barred by Statute of Limitations.

The statute of limitations applicable in this case is set forth in Article 43, UCMJ. "A person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command." Art. 43(b)(1), UCMJ. However, Congress ultimately recognized that the dismissal of a charge or specification for technical defects would prohibit subsequent prosecution for offenses committed prior to the applicable statute of limitations period, and subsequently amended Article 43, UCMJ, in 1988 to provide that, where charges or specifications have been dismissed for technical defects, the Government has an additional 180 days from the date of dismissal to prefer and refer new charges. *United States v. Province*, 42 M.J. 821, 825 (N.M.Ct.Crim.App. 1995), *aff'd*, 45 M.J. 359 (1996);[11] Art. 43(g), UCMJ.

The "savings clause" to Article 43, UCMJ, provides:

> If charges or specifications are dismissed as defective or insufficient **for any cause** and the period prescribed by the applicable statute of limitations
>
> (A) has expired; or

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[11] *Citing* Military Justice Amendments of 1986, Pub.L. No. 99-661, § 805(g), 100 Stat. 3908 (codified at 10 U.S.C. § 843(g) (1988)).

(B) will expire within 180 days after the date of dismissal of the charges and specifications, trial and punishment under new charges and specifications are not barred by the statute of limitations if

. . .

(A) [new charges and specifications are] received by an officer exercising summary court-martial jurisdiction over the command within 180 days after the dismissal of the charges or specifications; and

(B) [the new charges and specifications] allege the same acts or omissions that were alleged in the dismissed charges or specifications (or allege acts or omissions that were included in the dismissed charges or specifications.

Art. 43(g), UCMJ (emphasis added). Receipt of properly sworn charges by the summary court-martial convening authority within the statute of limitations will toll the statute, even though a new and untimely charge sheet is prepared. *United States v. Miller*, 38 M.J. 121 (C.M.A. 1993).

In *Miller*, the then Court of Military Appeals altered long-standing military practice in this area by holding that, as long as the offenses were properly referred and received by the summary court-martial convening authority within the statute of limitations, the fact that the accused is brought to trial on new charge sheets (i.e., not the original paperwork) is of no importance. *Miller*, 38 M.J. at 124. The key inquiry for statute of limitations purposes involves examining the original *charges* involved. In criticizing, and effectively overruling, their earlier opinion in *United States v. Rodgers*, 8 C.M.A. 226, 24 C.M.R. 36 (C.M.A. 1957), our superior court noted that:

> In the context of resolving the tolling of the statute of limitations, [the *Rodgers* opinion] apparently placed

> significant importance on the strict formality of which ***charge sheet*** was the vehicle for bringing the accused to trial, as opposed to which ***charges*** were laid against the accused at his trial.
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> *****
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> Clearly, the requirement of the statute of limitations in Article 43 is that 'sworn charges and specifications' be received by the summary court-martial authority within the prescribed period of time following commission of the offense. Thus, the timely receipt of 'sworn charges and specifications' tolls the running of the statute as to those charges and specifications. The charge sheet merely is the form -- the piece of paper -- that contains those sworn charges and that reflects that they were sworn and timely received; at least for purposes of this issue, that form has no independent importance of its own.
>
> Accordingly, when an accused is arraigned on charges and specifications that appear might be barred by the statute of limitations, the critical question posed by Article 43 is whether the 'sworn charges and specifications' were timely received, not whether the same piece of paper that contains those charges at the court-martial was the same piece of paper that conveyed those charges to the summary court-martial authority.

Miller, 38 M.J. at 124 (emphasis in original). In this case, Appellate Exhibit XIX, Exhibit B (the second charge sheet) properly tolled the running of the statute of limitations. Art. 43(b)(1) and (g), UCMJ. Thus, the correct inception date for appellant's offenses was five years prior to the date that the sworn charges on the second charge sheet were received by the summary court-martial convening authority on 10 September 1993. This inception date of 11 September 1988 was not pled in the third charge sheet, which instead pled a general inception

date of "September 1988." *See* Charge Sheet. Thus, the military judge correctly ruled on trial defense counsel's motion to dismiss by granting it with respect to offenses alleged before "11 September 1988," and denying it with respect to offenses alleged after that date. Record at 97-98; *see* Art. 43(g), UCMJ; *Miller*, 38 M.J. at 124 (quoting Art. 43, UCMJ). Accordingly, we find the appellant's assignments of error to be without merit.[12]

Convening Authority's Action

In a summary assignment of error, the appellant suggests that the convening authority's action in this case "is a nullity where he did not consider the Staff Judge Advocate's Recommendation [SJAR] or the results of trial prior to taking action on the case." Appellant's Brief of 12 May 1999 at 14. This assignment of error is apparently premised upon the fact that, in his action, the convening authority states that he considered the appellant's clemency request, but makes no specific reference to having also considered the SJAR or results of trial prior to taking his action. The appellant has cited us to no legal authority for his proposition that this omission constituted error. We find this claim specious and completely without merit.

While R.C.M. 1107(b)(3)(A) does require that the convening authority consider the results of trial and the SJAR prior to taking his or her action in a case, there is no requirement that the accomplishment of such consideration be written or recorded in any way in his or her action. Additionally, R.C.M. 1107(f), which dictates the required contents of the convening authority's action, contains no provision requiring that the convening authority affirmatively

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[12] Additionally, we note that the appellant has failed to cite even a single case in support of this assignment of error, instead relying solely on his novel interpretation of Art. 43, UCMJ. Appellant's Brief at 12-14.

acknowledge having considered the results of trial and the SJAR prior to acting on the case.[13]

There is no legal requirement that convening authorities specifically highlight their consideration of R.C.M. 1107 matter in their final action. In the absence of evidence to the contrary, we will presume the convening authority in this case acted lawfully, and properly considered everything that R.C.M 1107 required him to consider. *See United States v. Zaptin*, 41 M.J. 877, 880-81 (N.M.Ct.Crim.App. 1995); *United States v. Barnette*, 21 M.J. 749, 751 (N.M.C.M.R. 1985). We reject this assignment of error.

Admission of Appellant's Statements

In his final, summary assignment of error, the appellant asserts that the military judge erred when he admitted statements made by the appellant that were not properly preceded by Article 31(b), UCMJ, warnings. We disagree.

Specifically at issue are statements made by the appellant to his stepdaughter, TH, in a tape-recorded telephone conversation that was initiated at the behest of the Naval Criminal Investigative Service (NCIS). *See* Prosecution Exhibits 1, 1a, and 3. During this conversation, the appellant made numerous statements that might best be described as "inconsistent with innocence." On 16 March 1993, the victim, TH, called the appellant on the telephone. Unknown to the appellant was the fact that the conversation was being recorded, and that TH was actually calling at the request of NCIS agents for the purpose of eliciting incriminating statements from the appellant. TH called from an NCIS office while the appellant was at his unit on board the Marine Corps Air Station, El Toro. The appellant's statements were eventually admitted against him at court-martial over defense

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[13] There is also no such language contained in the various recommended formats for such actions and court-martial orders contained in the MCM.

objection.[14] Record at 199 (cassette admitted);[15] Record at 235 (portion of tape played for the members). We find absolutely no abuse of discretion or error in the admission of this evidence at the appellant's trial.

Article 31(b), UCMJ, warnings are not required to be given to a suspect during a pretext telephone call from a civilian victim, even if she is calling on behalf of law enforcement and the purpose of the call is to elicit incriminating statements. *United States v. Rios*, 48 M.J. 261, 265 (1998); *United States v. White*, 48 M.J. 251, 257 (1998); *United States v. Martin*, 21 M.J. 730, 732 (N.M.C.M.R. 1985). It is well-settled that Article 31(b) "applies only to situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry." *United States v. Duga*, 10 M.J. 206, 210 (C.M.A. 1981). Thus, in *Rios*, the Court of Appeals for the Armed Forces noted that Rios "thought he was talking to his daughter, not an interrogator or military

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[14] The appellant did not make an express confession during the conversation or expressly acknowledge his guilt. However, he did not deny his actions, or appear to be at all angry or upset at his stepdaughter for making what he would later emphatically insist were "false allegations." An admission by silence in the face of an official accusation is generally not admissible against an accused. MIL. R. EVID. 304(h)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1984 ed.). However, silence when confronted by a private party may constitute an admission by silence. *See United States v. Wynn*, 23 M.J. 726 (A.F.C.M.R. 1986)(upholding admission of accused's silence when confronted by store detective) *set aside on other grounds*, 26 M.J. 232 (C.M.A. 1988); *United States v. Cain*, 5 M.J. 844 (A.C.M.R. 1978) (upholding admission of accused's silence when confronted by robbery victim).

[15] *See* Prosecution Exhibit 1 (cassette tape of recorded phone conversation); Prosecution Exhibit 3 (excerpt from written transcript of phone conversation); Appellate Exhibit V (investigating officer's report) at Investigation Exhibit 4 (complete written transcript of phone conversation); Appellate Exhibit IX (defense motion to suppress tape recording); Appellate Exhibit X (Government response to defense motion to suppress tape recording); Record at 75-76 (military judge's findings of fact denying the motion to suppress).

superior." *Rios*, 48 M.J. at 264. Even though TH was technically a questioner "subject to the Code,"[16] there was nothing to suggest that the appellant perceived TH's discussion with him as anything more than a "casual conversation." *Duga*, 10 M.J. at 210; *Rios*, 48 M.J. at 264-65. Accordingly, there was no requirement to advise the appellant of his rights under Article 31(b), UCMJ. *Id.* At least one court has characterized "pretext" telephone conversations to elicit incriminating statements from a suspect as a "routine and permissible undercover technique." *United States v. Rios*, 45 M.J. 558, 564 (A.F.Ct.Crim.App. 1997)(quoting *United States v. Parrillo*, 31 M.J. 886, 893 (A.F.C.M.R. 1990)).

The appellant cites no authority whatsoever that Article 31(b), UCMJ, warnings were required under these circumstances. We see absolutely no basis in law or fact upon which to question the military judge's ruling in this case admitting such evidence. Accordingly, this summary assignment of error is rejected.

Conclusion

Accordingly, the findings and sentence, as approved on review below, are affirmed.

Chief Judge DeCICCO and Senior Judge TROIDL concur.

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[16] Under Mil. R. Evid. 305, a person "subject to the code" includes a person acting as a knowing agent for NCIS. *Rios*, 48 M.J. at 264.